

November 21, 2000

D.T.E. 99-271

Investigation by the Department of Telecommunications and Energy upon its own motion pursuant to Section 271 of the Telecommunications Act of 1996 into the Compliance Filing of Verizon New England Inc. d/b/a Verizon Massachusetts as part of its application to the Federal Communications Commission for entry into the in-region interLATA (long distance) telephone market.

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ORDER ON MOTIONS FOR CLARIFICATION AND RECONSIDERATION  
PERFORMANCE ASSURANCE PLAN

## I. INTRODUCTION AND PROCEDURAL HISTORY

The Massachusetts Department of Telecommunications and Energy ("Department") issued an Order on September 5, 2000 directing Verizon New England Inc. d/b/a Verizon Massachusetts ("VZ-MA")<sup>1</sup> to file a revised Performance Assurance Plan ("PAP" or "the Plan") for Massachusetts. With few exceptions, these revisions were designed to make VZ-MA's proposed PAP, filed April 25, 2000, consistent with the New York PAP adopted by the New York Public Service Commission ("NYPSC"), which the Federal Communications Commission ("FCC") found acceptable in ensuring that the local telephone service market remains open after Bell Atlantic New York ("BA-NY") received § 271 authorization.<sup>2</sup> VZ-MA filed its revised PAP on September 15, 2000. On September 21, 2000, the Department approved this revised Plan.

On September 25, 2000, Rhythms Links, Inc. ("Rhythms") filed a Motion for Reconsideration of the revised and approved PAP. On September 28, 2000, AT&T Communications of New England, Inc. ("AT&T") filed a Motion for Clarification and Reconsideration of the PAP. In a procedural memorandum issued on October 18, 2000, the Department requested comments on these two motions. The Department received initial comments from AT&T, RCN-BecoCom, L.L.C. ("RCN") and VZ-MA. The Department

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<sup>1</sup> Formerly New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts.

<sup>2</sup> Application by Bell Atlantic-New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, CC Docket 99-295, Memorandum Opinion and Order, FCC 99-404 (1999) ("Bell Atlantic New York Order").

received reply comments from AT&T, Covad Communications Company ("Covad"), Rhythms, VZ-MA, and WorldCom, Inc. ("WorldCom").

## II. STANDARD OF REVIEW FOR RECONSIDERATION AND CLARIFICATION<sup>3</sup>

The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at 16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that

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<sup>3</sup> The Department has stated several times throughout D.T.E. 99-271 that our inquiry in the instant matter is not an adjudication. However, in reviewing AT&T's and Rhythms' Motions for Clarification and Reconsideration, the Department finds the Department's Procedural Rule, 220 C.M.R. § 1.11(10), and standard of review as interpreted by Department precedent, to be instructive.

the Department's treatment of an issue was the result of mistake or inadvertence.

Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

Clarification of previously issued Orders may be granted when an Order is silent as to the disposition of a specific issue requiring determination in the Order, or when the Order contains language that is sufficiently ambiguous to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

### III. RHYTHMS' MOTION

Rhythms' Motion for Reconsideration of the Department's September 21, 2000 Order asks for Department action on the following issues: 1) establish a separate Mode of Entry ("MOE") category for digital subscriber line ("DSL") service, including line sharing, and incorporate eleven general DSL metrics and seven line sharing metrics in the MOE; and 2) include three general DSL and three line sharing metrics in the Critical Measures component of the Plan (Rhythms' Motion at 7). Rhythms recognizes that the Massachusetts PAP, like the New York PAP, includes four metrics relating to DSL, but contends that more are necessary (id. at 7-8).

1. POSITIONS OF THE COMMENTERS

AT&T supports Rhythms' motion and recommends an increase in the Plan's overall cap to reflect the new metrics (AT&T Comments at 1-2). AT&T states that the DSL and line sharing metrics in the PAP are limited to measuring VZ-MA's performance relating to initial installation (id. at 2). Consequently, the PAP fails to offer incentives for VZ-MA to respond to repair requests by CLECs or to perform repair jobs well once VZ-MA does respond (id.).

Covad supports Rhythms' motion to include a MOE category dedicated specifically to DSL network elements and services (Covad Reply Comments at 1). In addition, Covad agrees with Rhythms that the Department should create additional critical measures focusing on DSL and line sharing metrics (id.).

RCN urges the Department to withdraw its Evaluation of VZ-MA's § 271 Application until we have completed our review of the PAP (RCN Comments at 2). RCN agrees with the criticisms of the PAP set forth in the Rhythms' motion and states that the Department ignored RCN's suggestions for the PAP filed in its May 2000 comments (e.g., impose no cap on potential forfeitures, and direct VZ-MA to produce the documentation underlying its PAP proposal to determine if there were any trade offs between the benefits to VZ-MA of delaying competition versus the costs in PAP penalties) (id. at 3-4). RCN requests, therefore, that the Department re-evaluate the PAP with respect to the issues raised by it and other CLECs earlier in this proceeding (id.).

VZ-MA responds that if it is appropriate to add more DSL-specific metrics in the future, the Department has an established process whereby additions to the New York PAP can be incorporated into the Massachusetts PAP (VZ-MA Comments at 16-17). In its reply comments, Rhythms supports AT&T in requesting that the penalty cap of the PAP increase to accommodate new DSL metrics (Rhythms Reply Comments at 1).

## 2. Analysis and Findings

Presently, the Massachusetts PAP contains four DSL related metrics.<sup>4</sup> In general, we find that the Massachusetts PAP should be strengthened with respect to DSL services. The demand for, and importance of, advanced services provided by DSL and line sharing by consumers is fast increasing, and the VZ-MA performance standards and remedies in the PAP should reflect this fact. Therefore, we find as follows. The PAP should contain a MOE for DSL. It should also include additional DSL metrics (including specific line sharing metrics). We also find that additional DSL metrics shall be included in the Critical Measures component of the Plan. The question is how best to accomplish these changes. As discussed in Rhythms' motion, the NYPSC is presently engaged in its annual review of the New York PAP and squarely before the NYPSC is the request to amend the New York PAP to include new DSL

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<sup>4</sup> The four DSL metrics included in the PAP are PO-8-01 (average response time-manual loop qualification), PO-8-02 (average response time-engineering record request), PR-4-14 through PR-4-18 (percentage on-time completion), and PR-6-01 (percentage installation troubles for DSL capable loops). PAP, Appdx. B, Critical Measures.

line sharing measures for ordering, provisioning and maintenance, as well as modification of the DSL loop measures (Rhythms' Motion at 8).<sup>5</sup>

We understand that a decision from the NYPSC about whether to modify the New York PAP to incorporate DSL and line sharing specific performance measures and metrics will be issued next month. Because the Massachusetts PAP is largely based on the New York PAP, it will be helpful to first see what changes are made in New York prior to deciding on the specific changes to be made to the Massachusetts PAP. Thus, we will await NYPSC's decision rather than duplicate New York's investigative efforts on supplementary PAP measures. At that time, we will increase the amount of bill credits available under the PAP to account for the DSL metrics. In the event that the NYPSC does not, in timely fashion, make the changes discussed above, the Department will immediately begin an investigation of how to do so. That inquiry would proceed in an expedited manner and would include a request for comments on the appropriate increase for DSL bill credits. In either event, this important question will not be neglected.

#### IV. AT&T'S MOTION

AT&T's Motion for Clarification and Reconsideration asks the Department to further conform the Massachusetts PAP to the New York PAP by: 1) adding an express provision for Department authority to re-allocate bill credits; 2) offering a refund instead of bill credits to CLECs discontinuing service from VZ-MA; 3) eliminating language different from the New

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<sup>5</sup> Rhythms' Motion at 8, citing Petition Filed by Bell Atlantic-New York For Approval of a Performance Assurance Plan and Change Control Assurance Plan, in 97-C-0271, Case 99-C-0949, Notice Requesting Comments (August 28, 2000).

York PAP concerning statistical scoring of metrics with no volume; 4) including the same language that appears in the New York PAP for the scoring of measurements with a sample size of less than ten; 5) conforming the Domain Clustering rule with the rule in place in the New York PAP; 6) adding references to make the Change Control Assurance Plan (“CCAP”) Massachusetts-specific and, thus, make it explicit that the Department has enforcement authority; and 7) adding a statement that data reliability issues would be reviewed in subsequent audits and not just the first audit (AT&T Motion at 7-19, 22-24).

AT&T’s motion also requested that the Department reconsider the PAP’s elimination of the Electronic Data Interface (“EDI”) Special Provisions measures that are part of the New York PAP (AT&T Motion at 16); narrowing the PAP’s Waiver Provision (id. at 9-10); and offering remedies under the PAP as an alternative, as opposed to a supplement, to the remedies under the Consolidated Arbitrations (id. at 25-27). Additionally, AT&T’s motion sought clarification of the Department’s decision regarding a procedural trigger for the PAP: namely, that we should specify that an administrative investigation into VZ-MA’s underlying service problems will be triggered if VZ-MA reaches sub-cap liabilities under the PAP (id. at 20-22). AT&T also requested that the Department specify that CLECs and the AG be allowed to participate in the annual review of the PAP (id. at 24-25).

#### 1. POSITIONS OF THE COMMENTERS

With its October 27, 2000 initial comments, VZ-MA filed a revised PAP, which would:

- 1) add a provision for Department authority to re-allocate bill credits; 2) include the New York PAP language that VZ-MA will issue checks in lieu of outstanding bill credits to CLECs that



discontinue taking service from VZ-MA; 3) eliminate language that is different from the New York PAP concerning statistical scoring of metrics with no volume; 4) include the New York PAP language for the scoring of measurements with a sample size of less than ten; 5) conform the Domain Clustering rule with the rule in place in the New York PAP;

6) add references to make the CCAP Massachusetts-specific and, thus, make explicit the Department's enforcement authority; 7) add a statement that data reliability issues would be reviewed in subsequent audits and not just the first audit; and 8) add a provision stating that changes to the New York PAP will be filed with the Department within 30 days for proposed inclusion in the Massachusetts PAP after the Department's approval (VZ-MA Comments, October 27, 2000 Proposed Revised PAP).

With respect to AT&T's position that the Massachusetts PAP does not contain the \$24 million in credits included in the Special Provisions component in the New York PAP relating to EDI measures (AT&T Motion at 16-17), VZ-MA states that the EDI measures were added to the New York PAP after the approval of the initial New York PAP and were designed to address specific and transient performance problems encountered in New York (VZ-MA Comments at 11-12). VZ-MA states that the newly revised Massachusetts PAP allows the Department to make modifications or additions to the Massachusetts PAP should similar situations arise here in Massachusetts (id. at 11). With regard to AT&T's position that VZ-MA has not narrowly defined the waiver provision (AT&T's Motion at 9-10), VZ-MA states that the waiver provision places the burden on VZ-MA to demonstrate "clearly and convincingly" that the waiver is justified and that VZ-MA provides five narrowly defined

examples where a waiver would be appropriate (VZ-MA Comments at 8, citing PAP at 20-21). VZ-MA responds to AT&T's position that the Department reconsider its decision to impose the higher of the credits available under the PAP or Consolidated Arbitrations<sup>6</sup> by explaining that AT&T is one of only a few CLECs in New York with an interconnection agreement that includes monetary credits that approach levels comparable to those in the Consolidated Arbitrations (VZ-MA Comments at 13, n. 6). VZ-MA notes that, for the first half of 2000, only two CLECs in New York (neither of them, AT&T) received performance credits under interconnection agreements totaling approximately \$15,000. By comparison, the Consolidated Arbitrations plan in Massachusetts covers more than 30 CLECs; and under it 19 CLECs received credits exceeding \$2.1 million for the first half of 2000 (id.). Finally, VZ-MA states that the Department's September 5, 2000 Order is clear. Under that Order, a procedural trigger is pulled when VZ-MA's performance results in payments that reach the overall monetary cap of the Plan (VZ-MA Comments at 14). Moreover, the Department retains the discretion to determine the actual process, including participants, for annual review of the PAP (id. at 16).

AT&T responds to VZ-MA by stating that the facts presented by VZ-MA relating to the Consolidated Arbitrations have not been "thoroughly explored" by the Department; that the Department did not knowingly approve the elimination of the EDI measures; and that the

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<sup>6</sup> In November 1999, the Department adopted comprehensive performance standards and penalty credits to govern VZ-MA's wholesale performance to CLECs under interconnection agreements. See D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Consolidated Arbitrations, Phase 3-F (1999).

examples offered by VZ-MA in its waiver provision are vague and undefined (AT&T Reply Comments at 3-7).

WorldCom also disagrees with a portion of VZ-MA's newly revised PAP provision; specifically, the section allowing VZ-MA 30 days to file with the Department changes to the New York PAP for inclusion in the Massachusetts PAP (WorldCom Reply Comments at 1-2). WorldCom argues that this newly revised provision is inconsistent with the Department's September 5, 2000 Order requiring that changes to the New York PAP be incorporated in the Massachusetts PAP without a 30 day delay or further action on behalf of the Department (*id.*).

Finally, RCN supports AT&T's motion and requests that the Department reconsider the PAP based on the issues raised by various CLECs as well as the Department's decision not to specifically exclude VZ-MA from recovering PAP penalties under the Massachusetts Price Cap Plan (RCN Comments at 2-5).

## 2. Analysis and Findings

As stated in our Reply Comments to the FCC, "The modifications that VZ-MA recently proposed would, if adopted, eliminate most differences between the Massachusetts PAP and the New York PAP (which were addressed in AT&T's motion for reconsideration) and would further strengthen the PAP." D.T.E. Reply Comments at 106. These modifications address most of the concerns of the commenters about variations between the Massachusetts PAP and the New York PAP. We find these proposed changes reasonable and approve them. We next address those issues where CLECs and VZ-MA disagree.

When the Department adopted its PAP, we did not incorporate the EDI Special Provisions measures (and the additional \$24 million set aside for potential bill credits) contained in the New York PAP because we believed that the EDI Special Provisions component of the New York PAP was a temporary fix to a now resolved situation and that the NYPSC would modify its PAP at a later date to delete this provision. The New York PAP will be amended in December 2000, and so, we await the outcome in New York and propose to adopt here the EDI Special Provisions measures in the New York PAP. If necessary, at that time, we would increase the amount of bill credits available under the PAP to account for the EDI Special Provisions.

With respect to the PAP's waiver provision, as noted in our September 5, 2000 Order, the FCC found that the waiver process under the New York PAP "appear[s] to be reasonable" because: 1) the grounds for waivers were defined narrowly; 2) the NYPSC would only consider waiver requests in "limited, extraordinary circumstances;" and 3) the PAP placed time limits on the resolution of waiver requests. Bell Atlantic New York Order at ¶ 441. The FCC, nevertheless, was troubled by the overbreadth of one of the waiver grounds, which allowed Verizon to seek a waiver for "unusual" or "inappropriate" CLEC behavior. Id. at ¶ 441 n. 1355. As a result, our September 5, 2000 Order directed VZ-MA to either strike that provision or define it more narrowly. September 5, 2000 Order at 31.

The PAP, as approved, contains a waiver provision setting forth five narrowly-defined examples of CLEC behavior which could justify VZ-MA's filing of a waiver petition (PAP at 19-21). We agree with VZ-MA that these scenarios could influence VZ-MA's performance

results and are clearly and narrowly defined examples that the Department may consider when reviewing a waiver petition by VZ-MA. It is important to note that the waiver process is not intended as the only means by which VZ-MA may address CLEC behavior. Rather, under the PAP, VZ-MA must bring the alleged unusual CLEC behavior to the attention of the particular CLEC to attempt to resolve the underlying performance problem before filing a petition with the Department (PAP at 19-20). While AT&T raises concerns that examples of CLEC behavior are not explained (e.g., the undefined term “excessive” for missed appointments), we note that any waiver petition filed by VZ-MA must contain “detailed documentation of the events” and that VZ-MA has the burden to demonstrate “clearly and convincingly” that the waiver is justified (id. at 20-21). Additionally, CLECs will have the opportunity to respond to any VZ-MA waiver petition, and the Department will ultimately decide whether CLEC behavior influenced VZ-MA’s performance for any metric (id. at 20). Therefore, we will not eliminate or make changes to the waiver provision.

In our September 5, 2000 Order, we stated that the Department’s Consolidated Arbitrations performance standards and credits are better likened to a comprehensive PAP than to the limited contract provisions in the New York interconnection agreements. September 5, 2000 Order at 29-30. That is, the performance measures and remedies in Consolidated Arbitrations are similar in scope to the performance measures and remedies in the New York PAP. In addition, the contract liability in Massachusetts is significantly greater than VZ-MA’s contract liability in New York. Consequently, implementation of the penalty mechanisms under Consolidated Arbitrations and the Massachusetts PAP would result in double

counting and double penalties. The motions and comments filed by the CLECs have provided no evidence to suggest otherwise. Accordingly, we find no reason to alter the PAP in this regard.

A CLEC whose interconnection agreement incorporates the performance standards and credits set forth in the Department's Consolidated Arbitrations will receive the higher of the credits calculated under its interconnection agreement or the PAP, unless the CLEC chooses not to participate in the PAP, in which case that CLEC will continue to receive credits under Consolidated Arbitrations (PAP 17-19). This provision is fair to both VZ-MA and CLECs.

With respect to the Department's decision adopting a procedural trigger mechanism for the PAP, the Department's September 5, 2000 Order specifies that the Department may "investigate service problems if VZ-MA's performance results in payments that reach (or would have exceeded) the monetary cap." September 5, 2000 Order at 25. By 'monetary cap' we are referring to the PAP's overall monetary cap and not the PAP's sub-caps, as suggested by AT&T. As also noted in the September 5, 2000 Order, the Department retains the discretion to investigate wholesale service performance issues and to take the appropriate corrective action as needed. *Id.* n. 20. Therefore, we direct VZ-MA to add an express provision in the PAP setting forth this clarification of the procedural trigger mechanism. While AT&T requested we delineate who may participate in the Department's annual review of the PAP, we do not find it necessary at this time to specify the actual procedures for review of the PAP. Rather, we will wait and adopt a fair and reasonable process at the time of the PAP's review.

Finally, while WorldCom argues that changes to the New York PAP should be incorporated in the Massachusetts PAP without any delay or further action on behalf of the Department (WorldCom Reply Comments at 1-2), we find that a short delay is prudent so that the Department may assess the necessity and appropriateness of the New York changes in Massachusetts' context. It is possible, although unlikely, that a change made in New York would not be appropriate for the Massachusetts PAP. We want to deal with PAP changes as quickly as possible. Therefore, we direct VZ-MA to make this filing within ten calendar days of any NYPSC action affecting the New York PAP and to apprise us of the status of that action. We note, however, that VZ-MA's reporting of carrier-to-carrier measurements in Massachusetts shall change immediately, with no delay, to incorporate new or changed measurements in New York.

V. ORDER

After due notice and consideration, it is hereby

ORDERED: That the Rhythms' Motion for Reconsideration is denied; and it is

FURTHER ORDERED: That AT&T's Motion for Clarification and Reconsideration is hereby granted, in part, and denied, in part; and it is

FURTHER ORDERED: That the Performance Assurance Plan, filed by Verizon Massachusetts with the Department on October 27, 2000, is APPROVED in part and DENIED in part; and it is

FURTHER ORDERED: That within 5 days of the date of this Order Verizon Massachusetts shall file a revised Performance Assurance Plan in compliance with the directives herein, to be effective upon Verizon's entry into the Massachusetts long-distance market; and it is

FURTHER ORDERED: That Verizon Massachusetts shall comply with all other directives herein; and it is

FURTHER ORDERED: That the Secretary of the Department shall forthwith certify and transmit a copy of this Order to the Chief of the Common Carrier Bureau of the Federal Communications Commission and shall, upon its filing with the Department, certify a copy of the revised Performance Assurance Plan and transmit it to the aforesaid FCC official.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr. Commissioner

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Deirdre K. Manning, Commissioner